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 MAXMILIAN ZARZANA, AND PINAKI
 CHAKRAVORTY (erroneously sued
 herein as "MAXNILIAN ZARZANA" and
 "PINAKI CHAKRAVORT")

UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

HOWARD HERSHIPS,

Plaintiff,

v.

THE SUPERIOR COURT OF
 CALIFORNIA COUNTY OF SANTA
 CLARA, SANTA CLARA COUNTY
 DEPUTY DISTRICT ATTORNEYS
 MAXNILIAN ZARZANA, PINAKI
 CHAKRAVORT, STEVEN TODD
 KIRSCH, DAVID DUPERRAULT,
 GERALD SORENSON, PALO ALTO
 POLICE OFFICER CARLOS DE
 SANTIAGO, JOHN EVERDING AND
 DOES 1 through 20 inclusive,

Defendants.

No. 06-CV-6644 MJJ

**DEFENDANTS MAXMILIAN ZARZANA,
 AND PINAKI CHAKRAVORTY'S
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF SANTA
 CLARA COUNTY DEFENDANTS'
 MOTION TO DISMISS, OR IN THE
 ALTERNATIVE STAY, PLAINTIFF'S
 FIRST AMENDED COMPLAINT**

Date: August 28, 2007
 Time: 9:30 a.m.
 Crtrm: 11, 19th Floor
 Judge: Judge Martin J. Jenkins
 Action Filed: October 25, 2006

I. INTRODUCTION

Plaintiff Howard Herships ("Herships") may not force this Court to interfere with his *ongoing* criminal proceeding in state court. According to his complaint, Herships is *currently* a criminal defendant in a state court felony case, *People v. Herships*, No. BB 517233 (2005) ("the Criminal Proceeding"). (First Amended Complaint ("FAC"), ¶ 3). Herships maintains that a wide variety of defendants have conspired to file a "groundless" criminal complaint where

1 “there is no possibility of obtaining a conviction.” (FAC, ¶¶ 44-45). Instead of addressing this
2 concern in the Criminal Proceeding, Herships improperly filed the instant action.

3 He alleges that various witnesses, police officers, deputy district attorneys, and even the
4 state superior court have deprived him of unspecified civil rights. (FAC, ¶¶ 17, 31, 18 32).
5 However, Santa Clara County Deputy District Attorneys Maxmilian Zarzana and Pinaki
6 Chakravorty (“the County Prosecutors”) both enjoy absolute immunity with respect to all of the
7 allegations made against them. *See Imbler v. Pachtman*, 424 U.S. 409, 427 (1976). Even if the
8 immunities were inapplicable, Herships’ complaint should nevertheless be dismissed or stayed
9 under the *Younger* abstention doctrine. *See Younger v. Harris*, 401 U.S. 37 (1971). This
10 doctrine precludes Herships from seeking the requested relief in this Court while the Criminal
11 Proceeding is pending. Accordingly, the County Prosecutors bring the instant motion to dismiss
12 Herships’ complaint as to them.

13 II. STATEMENT OF ALLEGED FACTS

14 Herships brings three causes of action – two of which, implicate the County Prosecutors.¹
15 In his second cause of action, Herships alleges that Maxmilian Zarzana filed the criminal
16 charges giving rise to the Criminal Proceeding without probable cause. (FAC, ¶ 25). Zarzana is
17 also accused of selecting a judge whose husband had financial dealings with the victim. (FAC,
18 ¶¶ 22, 41). Pursuant to California Penal Code section 1054.2, the state criminal court issued an
19 order prohibiting Herships from obtaining witnesses’ addresses. (FAC, ¶ 12). By seeking and
20 abiding by this order, the County Prosecutors have allegedly violated Herships’ “right to
21 witnesses.” (FAC, ¶ 12, 26-27). Allegedly, Zarzana threatened to file additional criminal
22 charges if Herships violated the order. *Id.*

23 In his third cause of action, Herships alleges that the County Prosecutors participated in a
24 conspiracy to violate his civil rights. The County Prosecutors allegedly conspired with
25 defendant Steven Todd Kirsch (“Kirsch”) to file the criminal charges giving rise to the Criminal
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28 ¹ In his first cause of action, Herships seeks a TRO/Preliminary Injunction requiring the
court in the Criminal Proceeding to fund a private investigator. (FAC, ¶ 17).

1 Proceeding. (FAC, ¶ 33). Kirsch is both the plaintiff in a civil suit filed against Herships and
 2 the alleged victim in the Criminal Proceeding (wherein Herships allegedly vandalized Kirsch's
 3 vehicle). (FAC, ¶¶ 14, 34).

4 The criminal charges were allegedly filed so that Kirsch could obtain an advantage in his
 5 civil suit with Herships. (FAC, ¶ 37). In addition, the County Prosecutors allegedly permitted
 6 and/or encouraged witnesses to make false accusations in the Criminal Proceeding. (FAC, ¶¶
 7 34-35, 42, 48). The County Prosecutors allegedly accepted these false accusations, and
 8 improperly charged Herships with a felony. (FAC, ¶¶ 38-39).

9 III. ARGUMENT

10 Under Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed based
 11 upon a failure to allege either a cognizable legal theory or sufficient facts under a cognizable
 12 legal claim. *Balistreri v. Pacifica Police Dept.* 901 F.2d 696, 699 (9th Cir. 1990). Herships has
 13 alleged causes of action against the County Prosecutors under the Fourteenth Amendment and
 14 42 U.S.C. Section 1983. (FAC, ¶ 1). The County Prosecutors' alleged misconduct is
 15 intimately associated with the judicial phase of the criminal process. (FAC, ¶¶ 25, 44-45).
 16 Accordingly, the County Prosecutors are absolutely immune from Section 1983 monetary
 17 liability for this type of conduct – i.e., “initiating a prosecution and in presenting the State's
 18 case.” *Imbler*, 424 U.S. at 430.

19 Although the complaint may be dismissed based upon the immunities alone, it may also be
 20 dismissed, or stayed in the alternative, because the Criminal Proceeding is ongoing. (FAC, ¶¶
 21 3-4). *Younger*, 401 U.S. 37. Herships has improperly asked this Court to interfere with matters
 22 currently at issue in the Criminal Proceeding. For example, Herships' complaint asks this Court
 23 to determine whether the state's criminal action is “groundless” or whether “there is no
 24 possibility of obtaining a conviction.” (FAC, ¶¶ 44-45). These issues should instead be
 25 determined by the state superior court, charged with overseeing the Criminal Proceeding.

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A. The County Prosecutors Are Entitled To Absolute Immunity Because Their Alleged Misconduct Is Intimately Associated With The Judicial Phase Of The Criminal Process.

Herships' complaint should be dismissed as to the County Prosecutors because their alleged misconduct is "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430. "[I]n initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under Section 1983." *Id.* at 431. Herships' allegations against the County Prosecutors deal with the decision to file criminal charges. For example, Herships alleges that Maxmilian Zarzana filed the criminal charges giving rise to the Criminal Proceeding without probable cause. (FAC, ¶ 25). The County Prosecutors allegedly conspired with defendant Kirsch to file the criminal charges. (FAC, ¶ 33). Finally, the County Prosecutors filed criminal charges despite allegedly false accusations from witnesses. (FAC, ¶¶ 38-39).

The County Prosecutors may not be held liable based upon any of the above allegations because each allegation pertains to the decision to file charges. The prosecutor is "absolutely immune from liability for the decision to prosecute." *Hartman v. Moore*, 547 U.S. 250, 126 S.Ct. 1695, 1705 (2006). The decision to file criminal charges is absolutely protected even if it resulted from a conspiracy or other improper motive. *See Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986) ("Intent should play no role in the immunity analysis"); *Lewis v. Franklin*, 2007 U.S. Dist. LEXIS 148, *12 (D. Cal. 2007) ("Absolute prosecutorial immunity also bars conspiracy claims. . .").

Deputy District Attorney Maxmilian Zarzana is also entitled to immunity for allegedly selecting a judge whose husband had financial dealings with Herships' alleged victim. (FAC ¶¶ 22, 41). "[A] conspiracy between a judge and prosecutor to predetermine the outcome of a judicial proceeding, while clearly improper, nevertheless does not pierce the immunity extended to judges and prosecutors." *Ashelman*, 793 F.2d at 1078. Accordingly, Zarzana may not be held liable under Section 1983 for allegedly selecting a particular judge in the Criminal Proceeding.

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1 Furthermore, the County Prosecutors are entitled to absolute immunity for allegedly
 2 permitting and/or encouraging witnesses to make false accusations in the Criminal Proceeding.
 3 (FAC, ¶¶ 34-35, 42, 48). “[A] prosecutor is protected by absolute immunity when the
 4 prosecutor is accused of ‘telling the witness how to testify.’” *Faulkner v. County of Kern*, 2006
 5 U.S. Dist. LEXIS 44151, * 64 (D. Cal. 2006). The prosecutor’s efforts to control the
 6 presentation of his witnesses’ testimony are entitled to absolute immunity. *Imbler*, 424 U.S. at
 7 431, fn. 32. Conferring with potential witnesses for the purpose of determining whether to
 8 initiate criminal proceedings is a quasi-judicial function, and therefore, entitled to absolute
 9 immunity. *Demery v. Kupperman*, 735 F.2d 1139, 1144 (9th Cir. 1984). Accordingly, the
 10 County Prosecutors may not be held liable under Section 1983 for allegedly permitting and/or
 11 encouraging witnesses to make false accusations in the Criminal Proceeding.

12 Moreover, the County Prosecutors are entitled to absolute immunity for seeking and
 13 abiding by the state criminal court order prohibiting Herships from obtaining witnesses’
 14 addresses. (FAC, ¶ 12, 26-27). Even if these addresses constituted evidence, absolute
 15 immunity would apply to the County Prosecutors’ efforts to withhold them. *See Imbler*, 424
 16 U.S. at 431, n. 34 (absolute immunity available for “wilful suppression by a prosecutor of
 17 exculpatory evidence”); “[I]t is ‘now [a] well-settled rule that a prosecutor cannot be held
 18 personally liable for the knowing suppression of exculpatory information.’” *Robinson v.*
 19 *Volkswagenwerk AG*, 940 F.2d 1369, 1373 n. 4 (10th Cir. 1991) *citing Auriemma v.*
 20 *Montgomery*, 860 F.2d 273, 279 (7th Cir. 1988).

21 Similarly, the County Prosecutors are entitled to immunity for abiding by the state
 22 criminal court’s order prohibiting Herships from obtaining witnesses’ addresses. “[A]
 23 government official’s strict compliance with a facially valid judicial order issued by a court
 24 acting within its jurisdiction clothes the official with the absolute judicial immunity enjoyed by
 25 the judge issuing the order.” *Mays v. Sudderth*, 97 F.3d 107, 108 (5th Cir. 1996). In this
 26 context, judicial immunity applies to the government official because his duties and
 27 responsibilities are intimately connected with the judge’s own exercise of the judicial function.
 28 *Moore v. Brewster*, 96 F.3d 1240, 1244-1245 (9th Cir. 1996). Accordingly, the County

Prosecutors may not be held liable under Section 1983 for seeking and abiding by the state criminal court's order.

Therefore, the instant complaint should be dismissed as to the County Prosecutors because they are entitled to absolute immunity with respect to each of Herships' allegations.

B. Herships' Complaint Should Be Dismissed, Or Stayed In The Alternative, Because The Criminal Proceeding Is Ongoing In State Court.

The *Younger* abstention doctrine suggests that this Court should either dismiss or stay Herships' complaint because the Criminal Proceeding is ongoing. (FAC, ¶¶ 3-4); *Younger*, 401 U.S. 37. Generally, the *Younger* abstention doctrine prohibits federal courts from interfering with a pending state court proceeding. *Id.* "Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." *Younger*, 401 U.S. at 43. Nevertheless, Herships would have this Court interfere with the state court's administration of the Criminal Proceeding. The issues raised in Herships' complaint can, and should, be addressed by the state criminal court.

For example, Herships' complaint asks this Court to determine: 1) whether there is any possibility of obtaining a conviction in the Criminal Proceeding (FAC, ¶¶ 44-45); 2) whether the criminal charges giving rise to the Criminal Proceeding were filed as part of an improper conspiracy (FAC, ¶ 33); 3) whether witnesses in the Criminal Proceeding have made false accusations (FAC, ¶¶ 34-35, 42, 48); 4) whether the County Prosecutors have improperly charged Herships with a felony (FAC, ¶ 39); and 5) whether Deputy District Attorney Maxmilian Zarzana improperly selected the judge presiding over the Criminal Proceeding (FAC, ¶¶ 22, 41).

If this Court were to address these issues, then the Criminal Proceeding would be rendered moot. The notion of "comity" requires federal district courts to abstain, and allow state courts to address matters pending before them. *Younger*, 401 U.S. at 44-45. "Comity" refers to "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National

Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.” *Id.* at 44. In this respect, it would be improper for this Court to address issues pertaining to the Criminal Proceeding before the state criminal court has had the opportunity to do so.

Younger abstention applies to the instant matter even though Herships’ complaint seeks monetary damages. The Ninth Circuit has declared the following:

We are confident that *Younger* principles apply to a claim for damages based on constitutional challenges which can be asserted in pending state proceedings that implicate important state interests, and that the correct disposition is to defer – not to dismiss – when damages are at issue.

Gilbertson v. Albright, 381 F.3d 965, 982 (9th Cir. 2004).

Herships seeks both injunctive relief and monetary damages. (FAC, p. 11). Dismissal is appropriate to the extent Herships seeks injunctive relief in the instant action while a stay is appropriate to the extent he seeks damages. *Gilbertson*, 381 F.3d at 982. Therefore, the instant action should be dismissed, or stayed in the alternative.

IV. CONCLUSION

The County Prosecutors respectfully request that the instant complaint be: 1) dismissed as to them under the absolute immunities discussed above; 2) dismissed under the *Younger* abstention doctrine; and/or 3) stayed pursuant to *Gilbertson v. Albright* and the *Younger* abstention doctrine.

Dated: June 26, 2007

Respectfully submitted,

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